Supreme Court of the United States

OCTOBER TERM 1951

No. 654

EMMETT R. WARING, PETITIONER

vs.

RAY L. HUFF, GENERAL SUPERINTENDENT DISTRICT PENAL INSTITUTIONS

No. 655

EMMETT R. WARING, PETITIONER

vs.

JOHN B. COLPOYS, UNITED STATES MARSHAL

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, WITH BRIEF IN SUPPORT THEREOF AND APPLICATION FOR BAIL.

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No.

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PETITION FOR WRITS OF CERTIORARI

Emmett R. Warring, petitioner, prays that a writ of certiorari be issued to review the judgments entered July 29, 1941, in the United States Court of Appeals for the District of Columbia (R. 52-53).

JUDGMENTS BELOW

Appeals from judgments of United States District Court for the District of Columbia (R. 8-9 and 41-42).

These causes came on to be heard together from the United States District Court for the District of Columbia, and were argued by counsel (R. 43).

On consideration whereof, it is now here ordered that the orders and judgments of said District Court be and they hereby are affirmed.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and under Rule 38 of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939, as amended. The opinions of the United States Court of Appeals for the District of Columbia were filed July 29, 1941 (R. 44-51), and this petition was filed in September, 1941 (R. Cover). The opinions of the United States Court of Appeals for the District of Columbia are included in attached Record.

STATEMENT OF CASE

The United States Court of Appeals for the District of Columbia affirmed the orders and judgments of the United States District Court for the District of Columbia (R. 52-53), which Court discharged writs of habeas corpus, and dismissed the petitions upon which such writs were issued (R. 8-9 and 41-42). Both habeas corpus proceedings were consolidated for the purposes of argument in the United States Court of Appeals for the District of Columbia (R. 43).

The petitioner was convicted and sentenced in the United States District Court on four different charges of criminal

contempt in alleged violation of Section 268 of the Judicial Code (R. 40-41). Appellant also was sentenced upon a plea of guilty, upon a charge of criminal conspiracy under 18 U. S. C.

The following sentences were imposed in the contempt cases on February 24, 1939, and in the criminal conspiracy case on May 2, 1939:

Contempt case number 98—sentence of 1 year and 1 month (R. 7-8 and 40).

Contempt case number 99—sentence of 6 months (to run currently with the sentence imposed in Number 98) (R.40).

Contempt Case number 100—sentence of 1 year and 1 month (to take effect at the expiration of the sentence imposed in number 98) (R. 8 and 41).

Contempt case number 101—sentence of 6 months (to run concurrently with the sentence imposed in number 98) (R. 41).

Criminal Conspiracy case—sentence of 3 to 9 months (to take effect at the expiration of the sentence imposed in criminal contempt case number 100).

Criminal Contempt case number 98 charged the petitioner with causing to be offered a prospective juror certain money with intent to unlawfully and corruptly influence the vote of a prospective juror in case he, the said juror, should be selected to serve as a juror in a pending case against petitioner. The alleged misconduct of petitioner was charged and admitted by respondent to have occurred some days before the pending trial was set, and at places within the District of Columbia, but some miles distant from the Court house (R. 24-28).

Criminal Contempt case Number 99 charged the petitioner with telephoning and talking to one Quinlan with a view towards investigating the possibility of influencing a man if he should be selected to serve as a juror in the then pending case against petitioner. It was admitted by respondent that the acts charged were alleged to have occurred some days before the pending case was commenced, and at places within the District of Columbia, but some miles distant from the Court House (R. 28-31).

All the rules to show cause and citations are contained in the appendices to the briefs filed herein (R. 24-39).

Petitioner's first petition for writ of habeas corpus was filed March 14, 1941 (R. 2). In substance it alleged that the sentences imposed in Contempt cases number 98 and 100 were void, in that the sentences should have been imposed under the terms of "An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia," dated July 15, 1932, sec. 453, Tit. 6, D. C. Code (1929); that since the sentences in Contempt cases Nos. 98 and 100 were void, the petitioner had already served all valid sentences imposed upon him, and he should be discharged from custody (R. 2-4). A writ was issued (R. 4-5). and on March 18, 1941, a hearing was held and the writ was discharged (R. 8-9).

Petitioner's second petition for writ of habeas corpus (R. 12-14) was filed April 30, 1941. In substance it alleged that the convictions and sentences imposed in Contempt Cases Nos. 98 and 99 were void, because petitioner was serving sentences for alleged violations of section 268 of the Judicial Code, and the alleged misbehavior upon which the charges and convictions were based were not such as under section 268 of the Judicial Code, made him liable to summary punishment; that the court did not have jurisdiction to try, convict and sentence him, because the misbehavior

charged against him did not constitute contempt within section 268 of the judicial code. It was asserted that since the convictions and sentences in Contempt Cases Nos. 98 and 99 were void, the petitioner already had served all legal sentences imposed upon him (R. 12-14). A writ of habeas corpus was issued (R. 15) and a hearing held on May 8, 1941. The trial court discharged the writ and again remanded petitioner to the custody of the Lorton Penitentiary (R. 41-42).

The pertinent record and statutes involved in each case are contained in each brief, and are prayed to be as part hereof. In the first case the statute involved was Act of July 15, 1932 (47 Stat. 697, c.492, section 3); Title 6, sec. 453, Code of Laws of the District of Columbia (1929) as amended. In the second case the statute involved is section 268 of the Judicial Code, Rev. Stat. 725, Act of Mar. 3, 1911, c. 231; 36 Stat 1163; 28 U. S. C. A. 385.

QUESTIONS PRESENTED

1. Whether separate sentences to imprisonment in the penitentiary for terms exceeding one year imposed after convictions in alleged Criminal Contempt cases in violation of Section 268, Judicial Code, were proper, even though not imposed under the terms of "An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia", *supra.*

2. Whether the District Court had jurisdiction under section 268 of the Judicial Code to try, convict and sentence petitioner as for a criminal contempt, when it is admitted the alleged misbehavior was not such as made him liable to punishment after the decision of this Court on April 14, 1941, in *Nye v. United States.*

REASONS FOR GRANTING THE PETITION

By its opinion in/on the first question, the United States Court of appeals for the District of Columbia, is in conflict with the following cases and statutes:

Gompers v. United States, 233 U. S. 604.
Michaelson v. United States, 266 U. S. 42.
Ex Parte Grossman, 267 U. S. 87.
United States v. Goldman, 277 U. S. 229.
Creekmore v. *United States*, 237 F. 743.
Section 335, United States Criminal Code

By its opinion on the second question, the United States Court of Appeal's for the District of Columbia is in conflict with the following cases:

Nye v. United States, decided by this Court April 14, 1931.
Ex Parte Terry, 128 U. S. 289.
Ex Parte Cuddy, 131 U. S. 280.
Ex Parte Savin, 131 U. S. 267.
Ex Parte Lange, 85 U. S. 163.
Ex Parte Parks, 193 U. S. 18.
Ex. Parte Fisk, 113 U. S. 713.
Ex Parte Curtis, 106 U. S. 371.
Ex Parte Robinson, 19 Wall. 505.
Coll v. United States, 8F. (2d) 20.

Other reasons for granting petition for a writ, or writs, of certiorari are:

1. The United States Court of Appeals has not given proper effect to applicable decisions of this Court, the latest being *Nye v. United States*, decided April 14, 1941.

2. The United States Court of Appeals for the D. C. state in their opinion that this is a question of first impression

3. These are important questions of federal law which have not been, but should be, settled by this court.

4. The United States Court of Appeals has decided questions of general importance, and questions of substance relating to construction of statutes of the United States, which have not been, but should be settled by this court.

QUESTION I

Pretermitting the legality of the convictions, the sentences imposed in Criminal Contempt cases No. 98 and 100 are nullities in that they were not imposed under terms of the "Act to establish a Board of Indeterminate sentence and Parole for the District of Columbia."

Section 335 of the Criminal Code provides as follows:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year shall be deemed felonies." All other offenses shall be deemed misdemeanors.

All of the cases decided by this court hold that Criminal Contempt is an "offense" and a crime against the United States.

In the case of *Creekmore v. United States*, 237 F. 743, the court in deciding the point in question, stated:

"There is no doubt that the defendant has been proved guilty of a criminal offense."

"Assuming that criminal contempts are offenses in the meaning of this statute (sec. 335 Criminal Code) as they are in the holding of the Supreme Court in the Gompers case, *supra* under Revised Statutes, sec. 1044, we must

either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the Court in some mysterious way means that the discretion is limited to one year, without the thought being expressed. It will be observed that section 335, in defining felonies, said nothing about penitentiaries. *It is the length of possible imprisonment that fixes whether the offense is a felony or misdemeanor.* We see no reason why, under Judicial Code, sec. 268, the Court could not sentence a guilty party for a year and a day, and if it had this power, then sec. 335 of the Criminal Code *made it a felony.*

"It seems to be conceded that if the Court could sentence a defendant in a criminal contempt case for more than a year, and if his guilt was an offense under Rev. Stat. sec. 5541, then under that section as amended he could be sentenced to the penitentiary. The Supreme Court has held that a criminal contempt is an offense under R. S. 1044; we see no reason for holding that it is not an 'offense' under Criminal Code, sec. 335, and under Rev. Stat. sec. 5541."

We submit that the convictions in this case were for felonies, and the court should have sentenced the petitioner under the terms of the "Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia."

Act of July 15, 1932 (47 Stat. 697, c. 492, section 3); Title 6, sec. 453, D. C. Code (1929) as amended.

QUESTION II

The District Court had no jurisdiction to try, convict, and sentence the petitioner as for Criminal Contempts under section 268 of the Judicial Code, in cases numbered 98 and 99, and the petitioner should have been discharged on his writ of habeas corpus.

The misbehavior with which he was charged and for which he was convicted and sentenced was not such as made him liable to punishment under that section. This Court in *Nye v. United States*, decided April 14, 1941, held that the "misbehavior so near" the presence of the Court "as to obstruct the administration of justice" within the meaning of section 268 of the Judicial Code had a geographical and not a causal connotation.

In the case at Bar, the petitioner was charged with misbehavior some miles from the Court and some days before a pending trial. In the Nye case, *supra*, this Court construed such facts not to fall within section 268, Judicial Code, and stated the matter was a jurisdictional one by using the following language:

> "The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. *Hence, it was not embraced within section 268 of the Judicial Code.*"

The United States Court of Appeals for the District of Columbia decided that the Nye case would be followed after April 14, 1941, but the petitioner is not entitled to relief because the Nye case should be given a prospective and not a retroactive application.

The general principle seems to be that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.

It is admitted that recent decisions of this court hold that in contract cases an overruling decision should be given a prospective instead of retroactive application. Indeed, this Court in recent civil cases, has decided the question of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature of both of the statute and of its previous application, demand examination in order to determine whether an overruling decision should have a prospective or retroactive application. See *Chicot County Drainage District v. Baxter State Bank*, 308 U. S. 371.

But no cases have come to our attention which hold that an overruling decision should be given a prospective application to the detriment of a prisoner or defendant, so that he may be deprived of his liberty. It sometimes happens that a former decision is overruled to the prejudice of a defendant, but in such a case the courts are eager to relieve from the retroactive effect of the later decision, and in the few cases on the subject, have almost unanimously protected the defendant. See *State v. Bell*, 136 N. C. 674. The United States Court of Appeals in this case seems to have made the paradoxical holding that the petitioner would be entitled to release if prosecuted on or after April 14, 1941, but that his sentence is proper if he was convicted one or more days before that date. This is contrary to justice, and the prisoner should be discharged.

CONCLUSION

Wherefore, the premises considered, your petitioner respectfully prays that a writ or writs of certiorari be issued out of and under the seal of this Court directed to the United States Court of Appeals for the District of Columbia,

commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record, and all the proceedings in cases of *Emmett R. Warring v. Ray L. Huff*, and *Emmett R. Warring v. John B. Colpoys*, and that the said judgments of the United States Court of Appeals for the District of Columbia may be reversed and for such other and further relief as to the Court may seem meet and proper.

Emmett R. Warring,
Petitioner.

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